SUPREME COURT, U. S.
FILED
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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-378

JAMES NATHANIEL GIBSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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JAMES NATHANIEL GIBSON,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

James Nathaniel Gibson, through counsel, prays that writs of certiorari be issued to review the judgments of the United States Court of Appeals for the Fourth Circuit entered in the above entitled causes on August 5, 1974.

OPINIONS BELOW

By orders No. 72-1697, the United States Court of Appeals for the Fourth Circuit affirmed the judgment

of conviction ordered by the United States District Court for the Eastern District of Virginia, Alexandria Division, on April 13, 1972, as set forth in Appendix A. The opinion is reported as *United States v. Gibson*, Criminal No. 7672A (E.D. Va. 1972) (No written opinion).

JURISDICTION TO REVIEW

The date of the order and judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed is August 5, 1974.

The jurisdiction of this court is invoked under the Constitution of the United States and Title 28 USC 1331.

PRELIMINARY STATEMENT

This case is before this Court on a writ of certiorari arising out of an error assigned to the trial court's denial of Petitioner's motion to suppress certain wire tap evidence and upon the affirmance of the trial court's decision by the United States Court of Appeals for the Fourth Circuit which held that petitioner was in no way implicated by the defectively authorized wiretaps in *United States v. Mantello* and thus had no standing to complain about such taps. (App. B)

STATEMENT OF THE CASE

Petitioner was indicted on four counts under Title 18 USC Section 1084 and Section 1952. Petitioner on April 13, 1972, was found guilty of Count I and Counts II, III and IV were dismissed. A timely appeal was taken to the United States Court of Appeals for the Fourth Circuit and counsel for defendant was in due course notified by the Chief Judge for the Fourth Circuit on June 5, 1973, that "in light of the similarities of the issues in this case with those in *United States v. Giordano*, 469 F.2d 522, cert. granted, 41 L.W. 3513 (March 27, 1974), and *United States v. Chavez*, ____F.2d____, 13 Cr.L.Rep. 2001, cert. granted, 41 L.W. 3613 (April 22, 1973), further action in this case will be postponed until the United States Supreme Court announced its decision in Giordano and Chavez". (App. C)

On May 13, 1974, the Supreme Court of the United States announced its decision in the Chavez case and on August 5, 1974, the United States Court of Appeals for the Fourth Circuit announced its decision in the instant case. The Fourth Circuit held that the petitioner was within the purview of the *United States v. Chavez*, but was not an "aggrieved person" within the meaning of the statute, 18 USCA, Section 2518 (10)(A), since he was not implicated in the defectively authorized Mantello taps. The court further held that no proffer of information derived from such taps were made against him. The operative facts of petitioner's case establish that the evidence gained from the wire intercepts before this court is inexorably interwoven with wire intercepts of *United States v. Mantello, et al.* (See memorandum

and order filed May 29, 1972, by Judge Corcoran of the United States District Court of the District of Columbia. (App. D) The very intercept before this Court and implicating petitioner is the same interception referred to in Mantello as *Intercept 2* and was derived directly and solely from the intercepts referred to in the Mantello case as 1(a) and 1(b). (See stipulation, App. E.) The interrelated intercepts are set forth below.

Intercept 1(a) was secured on an order entered on October 29, 1970, by United States District Judge John Pratt, approving intercepts for (i) a telephone located in Apartment 817, 1425 N Street, N.W., Washington, D. C., and (ii) a pay telephone located in the lobby of 1425 N Street, N.W., Washington, D. C.

Intercept 1(b) was secured on an order entered on November 13, 1970, by Judge Pratt, approving an extension of the intercept period for fifteen (15) days on the two telephones noted in 1(a) supra.

Intercept 2 was secured on an order entered on November 25, 1970, by United States District Judge Frank Kaufman, approving intercepts on two telephones located in Apartment 1416, 8200 Wisconsin Avenue, Bethesda, Maryland.

Intercepts 1(a) and (b) implicated Louis Mantello involved in the Mantello case. These intercepts shall be referred to hereinafter as the *Mantello Tap* and *Mantello Extension Tap*. *Intercept 2* implicated one John Constantine Commings and Gibson, the Petitioner before this court. Intercept 2 hereinafter shall be referred to as the *Commings Tap*.

The Government's affidavits, which were filed and attached to its memorandum in opposition to petition-

er's motion to suppress, revealed, as to the *Mantello Tap*, that Sol Lindenbaum, the Executive Assistant to the Attorney General, placed the Attorney General's signature to the October 28, 1970, memorandum reciting that Will Wilson, Assistant Attorney General, was "specially designated" to authorize Donald Campbell, Assistant United States Attorney, to make application to the court for the intercept order for the Mantello Tap. (R. 28,29,30, App. F.) However, Harold Shapiro, the Deputy Assistant Attorney General in the Criminal Division, and not Will Wilson, affixed the signature of Will Wilson to the letter authorizing Campbell to make application for the court order. Will Wilson "had not examined the file" concerning the pending application for the *Mantello Tap*. (R. 28,39; APP. G.)

The same procedure was followed as to the *Mantello Extension Tap*, except that Henry Peterson, a Deputy Assistant Attorney General in the Criminal Division, affixed Will Wilson's signature to the letter of authorization to Campbell to make the application to the court for the intercept order. (R. 28,29,31,34,35; APP. F,H,I.) In other words, the application was processed through Lindenbaum to Peterson to Campbell. Neither the Attorney General or a specially designated Assistant Attorney General personally reviewed or ever handled the papers.

As to the *Commings Tap*, according to Sol Lindenbaum's affidavit, John N. Mitchell, then Attorney General, personally initiated the November 24, 1970, memorandum reciting the special designation of Will Wilson to authorize the application for the court

order approving the *Commings Tap*. However, Henry Peterson, and not Will Wilson, again, affixed Wilson's signature to the letter authorizing Campbell to apply for the court order. (R. 28,29,34,35; APP. F,I.)

The basis for the indictment and the Government's evidence against petitioner rests chiefly upon the information derived from the *Commings Tap*.

QUESTIONS PRESENTED

I. Whether the designation of certain portions of Title III of the Omnibus Crime Act as central or substantially related to the Congressional scheme is a patent abridgment of the doctrine of separation of powers tantamount to judicial legislation?

II. Whether this Court's interpretation of the procedures relating to the obtaining of applications for wiretap authorization negated not only the express statutory language and Congressional intent behind Title III of the Omnibus Crime Control and Safe Streets Act of 1968 in 18 USC Sections 2515 and 2518(1)(a) and (4)(d) and (10)(a)(i) et seq, but also the general rules of construction of penal statutes?

III. Whether the question of standing can be considered before satisfaction of the requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 in 18 USC Section 2518 et seq.

IV. Whether the choice of rules with respect to standing should be to extend standing to anyone within the scope of negligence or professional misconduct of those charged with the federal government's chief

administration of justice; and whether the wrong committed against the petitioner is of such a nature as to require supression of the wiretap evidence?

ARGUMENT

I.

This Court's designation of certain portions of Title III of the Omnibus Crime Control And Safe Streets Act of 1968 as central or substantially related to the Congressional scheme is a patent abridgment of the doctrine of separation of powers and is tantamount to judicial legislation.

In *United States v. Chavez*, ____U.S.____, 40 L.Ed.2 380, 94 S. Ct. ____ (1974), this Court stated that 18 U.S.C., Sections 2518(1)(a) and (4)(d) of the Omnibus Crime Control And Safe Streets Act of 1968 were not meant, by themselves, to occupy a "centrl," [sic] or even "functional," role in guarding against unwarranted use of wiretapping or electronic surveillance.

Section 2518(1)(a) states:

> Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> (a) The identity of the investigative or law enforcement officer making the application and the officer authorizing the application;

Section 2518(4)(d) states:

Each order authorizing or approving the interception of any wire or oral communication shall specify–

(d)The identity of the agency authorized to intercept the communication, and of the person authorizing the application;

In *Chavez*, the Court admits that the Congressional intent of Section 2518(1)(a) and (4)(d) is to "fix the identity and responsibility" to:

(1)the person making the application.

(2)the officer authorizing the application.

(3)the identity of the agency authorized to intercept the communication.

(4)the person authorizing the application.

But the Court goes on to say that failure to comply with the identification requirements in these sections is not such a departure from the Congressional scheme or intent as to require the suppression of the wiretap evidence pursuant to 18 U.S.C. Section 2518(10)(a)(i), which states that:

> Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that–
>
> (i) the communication was unlawfully intercepted;

Despite the statement in *Chavez* that Congress intended an unlawful interception to include commu-

nications intercepted in violation of either constitutional or statutory requirements, this Court concluded that the purpose served by the identification requirements of Section 2518(1)(a) and (4)(d) do not require suppression of wiretap evidence for noncompliance with these sections. The reasoning behind this conclusion was that the aforesaid sections are not central or substantially related to the Congressional scheme found to exist by this Court as the key to interpreting the Omnibus Act, supra.

The exclusion of certain portions of the Act designated in this Court's view as not being central or substantially related to the Congressional scheme should be examined in light of *United States v. O'Brien*, 391 U. S. 367, 383 (1978) in which the Court reiterated the fundamental principle of constitutional law of not considering when interpreting a statute, the motive or purpose of the legislation since inquiries into legislative motives or purposes are hazardous matters. When the issue is simply the interpretation of legislation, courts will look to legislator's statement for guidance as to the purpose of the legislation. Inquiries by the Supreme Court into legislative purpose or motive are limited to a well-defined class of cases where the very nature of the constitutional question requires such an inquiry. One of the principal illustrations of the class of cases in which the Court makes a determination of legislative purpose are those in which statutes have been challenged as bills of attainder–defined as a legislative Act which inflicts punishment on named individuals or members of an easily ascertainable class or group prior to, or without, a judicial trial. Inasmuch as Sections 2518(1)(a) and (4)(d) cannot, nor any section of the Omnibus Act, be

construed to be in the nature of a bill of attainder, the *Chavez* Court has made an uncalled-for inquiry into the Congressional purposes of the identification requirements of the aforesaid sections.

In contradistinction to *Chavez*, the prior decisions of this Court do not permit it to pick and choose among the legitimate legislative aims to determine which is primary and which subordinate. *McGinnis v. Royster*, 410 U.S. 263 (1973). Legislative solutions to the condition the particular legislation addresses itself to must transcend uncalled-for inquiries into legislative motives. *South Carolina v. Katzenback*, 383 U.S. 301 (1966). This Court, in *Palmer v. Thompson*, 403 U.S. 217 (1971), stated that it could not legitimately determine the primary purposes or motives because legislation is frequently multi-purposed; and the removal of even a subordinate purpose may shift altogether the consensus of legislative judgment supporting the statute.

The *Chavez* designation of Sections 2518(1)(a) and (4)(d) as not being central or substantially related to the Congressional scheme of purpose of the Omnibus Act is an attempt by the Court to substitute its wisdom for that of Congress in making a determination of when evidence should be suppressed under 2518(10)(a)(i). If Congress had not intended Section 2518(10)(a)(i) to apply to noncompliance with the identification requirements of Section 2518(1)(a) and (4)(d), it could have expressly stated so in either the Act itself or in the legislative history as reflected in the U. S. Congressional Code And Administrative News.

In light of the express statutory language and legislative hisotry, the deemphasis of the importance of 2518(1)(a) and (4)(d) is a clear and patent abridgment

of the doctrine of separation of powers between the legislative and judicial branches of our government, which has long recognized that courts will not encroach upon the domain of a coordinate department of the government by judicial enlargement, abridgement, alteration or repeal of legislative enactments. *Ebert v. Poston*, 266 US 543 (1925).

ARGUMENT

II.

This court's interpretation of the procedures relating to the obtaining of applications for wiretap authorization negated not only the express statutory language and congressional intent behind Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 in 18 USC Sections 2515 and 2518 et seq, but also the general rules of construction of penal statutes.

The statutory language and Congressional intent has been covered in Argument III attached as Appendix J.

The Court of Appeals for the Fourth Circuit in *United States v. Williams,* 485 F.2d 1383 (1973) stated in its opinion that criminal statutes are to be strictly construed and that ambiguities are to be resolved in favor of the defendant; however, statutes are not to be construed in a manner which would defeat their clear purpose and in interpreting statutes it is sufficient if the words are given their fair meaning in accordance with the evident intent of Congress. *United States v. Cook,* 384 U.S. 257 (1966).

The rule of strict construction is followed in Virginia and applied to penal statutes. It is a rule of general application that such statutes are not to be extended by construction, but must be limited to cases clearly within the language used. Every case charged as a violation must come within the letter, spirit and purpose of the statute; and the penal statute cannot be extended by implication or construction. The statute cannot be made to embrace cases not within the reason and policy of the law. *Anderson v. Commonwealth of Virginia*, 182 Va. 560, 29 SE2d 838.

In *Jefferson v. Commonwealth*, 201 SE2d 749, the Virginia Supreme Court of Appeals stated that where the language of the statute is clear and plain, courts do not look for ambiguities in order to apply certain rules of construction. The accused is entitled to have the criminal statute under which he is charged construed strictly.

The same court in *Greer v. Dillard*, 193 SE2d 668 (1973), stated that the main function of statutory construction is to give effect to the intention as expressed in the statute and without legislative history permitting broader construction, statutory words must be given the meaning they have acquired from common usage.

The source of legislative history contained in Senate Report 1097 of April 29, 1968, stressed that the *identity* of the person who makes and the person who authorized the application be set out to fix the responsibility.

In this case, the misrepresentation of the official who authorized the wire intercept application violates not only the statutory exclusionary rule of Title 18 U.S.

Code Section 2515, but also the Constitutional exclusionary rule which rule prohibits the issuance of a warrant which is not supported by "oath or affirmation". Upon a showing that the oath is violated by the applicant's misrepresentation of the official who authorized the wire intercept application, the warrant is violated and the exclusionary rule of the Fourth Amendment is invoked. *King v. United States*, 282 F.2d 398 (4th Cir. 1960).

ARGUMENT

III.

The choice of rules concerning standing should be the one which extends standing to anyone within the scope of negligence or professional misconduct of those charged with the federal government's chief administration of justice and the wrong committed against petitioner is of such a fundamental nature as to require suppression of the wiretap evidence.

The questions presented as III and IV are interrelated. The answer suggested by question III is self evident and requires no further argument.

Within the framework of the Fourth Amendment protections, a review of the law of standing reveals two competing rules. The first is based upon what may be characterized as the police deterrent rationale and the second upon a theory of personal rights which are enforced by the exclusionary rule only in the instance of one whose own protection was infringed upon by constitutional misconduct. *United States v. Jeffers*, 342

U.S. 543. The latter rule is the underpinning of Judge Haynsworth's decision in *United States v. Gibson* (U.S. Court of Appeals, 4th Cir.), No. 72-1697, argued October 30, 1972, and decided 1974. This decision held that Gibson was not an "aggrieved person" within the meaning of 18 USCA Section 2518 (10)(a) and that the clear implication of the statute is that such a person should not include one who was not implicated and against whom no one has made a proffer of information derived from defectively authorized wiretaps (Mantello taps).

In the instant case it is established that no evidence derived from the Mantello taps in any way implicated Gibson, but such evidence did directly implicate Gibson in the Commings tap. The statement of the court below that the application for obtaining the wiretaps authorization was "properly processed in the Department of Justice, duly authorized by the Attorney General himself, and the District Court for the District of Maryland authorized installation of the Commings tap" is a conclusion based upon a conclusion. In fact each phase of the quoted statement though set forth as the *purported* intrinsic facts represented a choice of inferences which were probably less realistic than the inference not chosen to establish "conclusory" findings of fact.[1]

[1]The memorandum of November 25, 1970, is a good illustration. (App. F,L) From the memorandum itself the more realistic inference was that the memorandum was a designation of Will Wilson to exercise the powers and discretions conferred by statute (18 USC Section 2516(1)), upon the Attorney General or an Assistant Attorney General specifically designated by the Attorney General than that it was an authorization of the District Attorney to apply for judicial approval of the Commings

A careful examination of all the opinions as well as pertinent parts of the Gibson brief below (App. J) shows that the then Attorney General, John Mitchell, did authorize in the Gibson case the wiretap application identical to that authorized in Chavez. What is demonstrated through this conduct is the negligence and the lack of professionalism of the top Justice Department officials. It is clearly shown from the facts of Gibson and Chavez that these officials after assisting Congress from 1961 to 1968 in the drafting of the legislation which finally evolved as the Omnibus Crime Control and Safe Streets Act of 1968 (see App. K) never at any time synchronized the administration of the Department of Justice to conform with the procedural requirements of the Act.

It is important to realize that the wiretap implicating Gibson violated his most fundamental and basic right in his right to privacy. This right has been long recognized as so essential and fundamental to the continued existence of a society of free and civilized men that any diminution of that right impairs the strength and vitality of the very foundation necessary to support that society. Whether Gibson's right to privacy is invaded by conduct characterized as "procedural error" or by an on-the-street warrantless search of his person

---

tap; similarly from the initials of the Attorney General on the same memorandum the more realistic inference was that the Attorney General was aware of the circumstances relating to a probable Commings tap rather than that his initials meant approval of the wiretap application. This view seems reinforced when it is recognized that the meaning of the Attorney General's initials on this type of memorandum was never revealed until the issue arose on motions to suppress this type of wiretap evidence.

without probable cause, invasion to his privacy has occurred and requires in either case the application of the exclusionary rule.

This rule should apply without regard to whether Gibson's right has been invaded directly or indirectly, to deter official misconduct. Perhaps there may be some justification for limiting the application of the exclusionary rule to a direct violation of one's right to privacy in the case of the blundering constable, but this should not be the rule in the case where one's right to privacy in invaded by the negligence or the professional misconduct on the part of those charged with the federal government's administration of the highest office of justice. To those with such a charge, there should be a higher duty of care than that imposed upon the constable upon his beat.

CONCLUSION

For the foregoing reasons this petitioner requests that the Court grant his petition for certiorari.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1974

No. 74-378

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Appendix
TO

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ATTACHMENTS TO COMMINGS INTERCEPT ORDER

Attachment 1
November 25, 1970 Application For Order Authorizing Commings Intercept

Attachment 2
Order Authorizing Commings Intercept

Attachment 3
Letter Authorizing Applicant

CORRECTIONS:

1. Footnote 1 should be Memorandum of November 24, 1970 instead of November 25, 1970.
2. The first paragraph of page 15 of Petitioner's Petition for Certiorari is corrected as follows:

> "A careful examination of all the opinions expressed in *Chavez* as well as the pertinent parts of the Gibson Brief below (App. j) shows that the then - Attorney General, John Mitchell, merely purportedly authorized in the Gibson case a wiretap application identical to that purportedly authorized in *Chavez*. The failure to comply with the mandatory preliminary processing procedures required under both 18 USCA Sections 2516 (1) and 2518 (1)(a) and (4)(d) of the Omnibus Crime Control and Safe Streets Act of 1968 is a clear demonstration of the negligence and the lack of professionalism of the top Justice Department officials. It is clearly shown from the facts of Gibson and *Chavez* that these officials after assisting Congress from 1961 to 1968 in the drafting of the legislation which finally evolved as the aforesaid Omnibus Act (see App. k) never at any time synchronized the administration of the Department of Justice to conform with the procedural requirements of the Act."

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	:	
-vs-	:	CRIMINAL NO. 76-72-A
JAMES NATHANIEL GIBSON, Defendant.	:	

Alexandria, Virginia
Thursday, April 13, 1972

The above-entitled cause came on to be heard before The Honorable Albert V. Bryan, Jr., Judge of the District Court of the United States for the Eastern District of Virginia, in the Post Office Building, Alexandria, Virginia, commencing at 10:00 o'clock a.m.

PRESENT:

DAVID H. HOPKINS, Jr., ESQ., on behalf of the United States of America;

HENRY B. ZACHARY, ESQ., and JOSEPH B. BULLOCK, ESQ., on behalf of the Defendant.

PROCEEDINGS

MR. HOPKINS: There was a waiver of jury trial filed, your Honor, yesterday, I believe.

THE COURT: All right, sir.

MR. HOPKINS: Your Honor, I would like at this time to read into the record and to advise the Court that the following stipulation which bears the signatures of Mr. Gibson and his counsel, Mr. Bullock and Mr. Zachary, in addition to my own, is relative to Count I of the indictment presently before the Court.

THE COURT: Is it a written stipulation?

MR. HOPKINS: It is, your Honor.

THE COURT: There is no need to read it into the record, then, Mr. Hopkins.

MR. HOPKINS: All right, I will at this time tender this stipulation and rest, your Honor.

THE COURT: All right, sir.

Does either the United States or the Defendant desire to introduce any evidence in addition to the stipulation?

MR. BULLOCK: Your Honor, we just desire to enter a plea of not guilty.

THE COURT: You have already entered a plea of not guilty.

MR. ZACHARY: Yes, your Honor.

THE COURT: It is agreeable that the Court try the case on the stipulation, is that correct?

MR. ZACHARY: It is agreeable.

MR. BULLOCK: It is agreeable.

THE COURT: And neither side desires to introduce any additional evidence?

MR. HOPKINS: The Government has rested, your honor.

MR. ZACHARY: The Defense has.

THE COURT: Does the Defendant want to make any statement in his own behalf?

THE DEFENDANT: No, sir.

MR. ZACHARY: No, your Honor.

THE COURT: All right. Based on the stipulation, which I adopt as the Court's findings of fact, it will be the judgment of the Court that the Defendant is found guilty as charged in Count I of the indictment.

MR. HOPKINS: At this time the Government would move to dismiss Counts II, III and IV.

THE COURT: All right, sir. Any objection to that?

MR. ZACHARY: No objection, your Honor.

THE COURT: Counts II, III and IV will stand dismissed. Imposition of sentence in the case will be postponed and the matter referred to the Probation Office for a presentence investigation and report, and I will continue the matter for the imposition of sentence.

The case will be continued until May 12 for

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

(Caption omitted in printing)

Stipulation

It is hereby stipulated by and between the United States and JAMES NATHANIEL GIBSON, as follows:

1. That on December 1, 1970 JAMES NATHANIEL GIBSON, defendant herein, was engaged in the business of betting and wagering.

2. That on December 1, 1970, JAMES NATHANIEL GIBSON by telephone furnished an individual at 8200 Wisconsin Avenue, Bethesda, Maryland, the phone number 836-3484, said telephone being located at 323 Buchanan Street, Alexandria, Virginia, with instructions to call this number to obtain information assisting in the placing of bets and wagers on contests, to-wit: numbers lottery wagers based on horse race results.

3. That on December 1, 1970 pursuant to the directions of JAMES NATHANIEL GIBSON, the same individual placed a telephone call in interstate commerce from the aforementioned Bethesda, Maryland, address to the aforementioned Alexandria, Virginia address, in the Eastern District of Virginia, where the call was received.

4. That the person receiving the call in Alexandria, Virginia did discuss with the individual in Bethesda, Maryland the time to receive "work" and to furnish the "work" to the Maryland individual, when the "line" is received, when the "ribbon" is received, who took the Virginia person's "work" for that day and how it was to be furnished the Maryland individual.

5. That the "work" discussed therein was numbers lottery bets, that the "line" and "ribbon" pertained to the placing of wagers and payoffs, and that this telephone conversation over a wire communication facility in interstate commerce was conducted at the request and direction of the defendant JAMES NATHANIEL GIBSON with the knowledge that information would be communicated assisting in the

placing of numbers lottery bets, and in fact such information was communicated in the described telephone conversation.

It is the understanding of the parties hereto that upon a finding of guilt of the defendant JAMES NATHANIEL GIBSON to Count I of the indictment in this action captioned and styled as above the United States will move to dismiss Counts II, III, and IV of this indictment. This stipulation is without prejudice to appellate review of issues raised by motion to suppress.

/s/ James Nathaniel Gibson
James Nathaniel Gibson

/s/ Joseph B. Bullock
Joseph B. Bullock
Counsel for defendant

/s/ Henry B. Zachary
Henry B. Zachary
Counsel for defendant

/s/David H. Hopkins
David H. Hopkins
Assistant United States Attorney

United States District Court

FOR THE

EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA

FILED

MAY 12 1972

CLERK, U. S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

United States of America

v.

JAMES NATHANIEL GIBSON

No. 76-72-A

On this 12th day of May, 1972 came the attorney for the government and the defendant appeared in person and[1] by counsel.

IT IS ADJUDGED that the defendant upon his plea of[2] "not guilty" and a finding of guilty as to count one (1)

has been convicted of the offense of Transmission of wagering information - (violation of T.18 USC S.1084&2)

as charged[3] in the Indictment

nd the court having asked the defendant whether he has anything to say why judgment should not e pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or is authorized representative for imprisonment for a period of[4] two (2) years and fined he sum of Five Thousand Dollars ($5,000.00).

~~IT IS ADJUDGED THAT~~

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the ·ited States Marshal or other qualified officer and that the copy serve as the commitment of the :endant.

---------- CTR 13-1 ----------,
United States District Judge.

~~The Court recommends commitment~~

---------- ----------,
Clerk.

[1]Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights ounsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon d that he waived the right to the assistance of counsel." [2]Insert (1) "guilty and the court being satisfied is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of y," or (4) "nolo contendere," as the case may be. [3]Insert "in count(s) number " if required or (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or conively and, if consecutively, when each term is to begin with reference to termination of preceding term or to other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of ine or fine and costs, or until he is otherwise discharged as provided by law. [4]Enter any order with respect to ension and probation. [5]For use of court to recommend a particular institution.

Attachment to Appendix A

APPENDIX B

HENRY B. ZACHARY
ATTORNEY AT LAW
120 N. ST. ASAPH STREET
ALEXANDRIA, VA. 22314

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

RECEIVED
AUG 6 1974
Clerk, U. S. C...
...VA.

No. 72-1697

United States of America,

Appellee,

versus

James Nathaniel Gibson,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued October 30, 1972.* Decided August 5, 1974

Before Haynsworth, Chief Judge and Craven and Widener, Circuit Judges.

Joseph B. Bullock (Henry B. Zachary, on brief) for Appellant; Brian P. Gettings, United States Attorney, (David H. Hopkins, Assistant United States Attorney, on brief) for Appellee.

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* This case was held in abeyance until May 13, 1973, pending the decision in the United States Supreme Court on that date in United States v. Giordano and United States v. Chavez.

HAYNSWORTH, Chief Judge:

Convicted of the illegal transmission of wagering information in violation of 18 U.S.C.A. § 1084, the defendant has appealed complaining of the district court's failure to suppress evidence obtained from a tap upon the telephone of one Commings. The only claim of illegality in the Commings tap, is that probable cause for that tap was obtained in part from earlier taps on the telephones of one Mantello. The authorization of the Mantello taps was defective under Title 3 of the Omnibus Crime Control and Safe Streets Act of 1968, and it is said that the suppressible information obtained from the Mantello taps infected the later Commings tap. Since the Mantello taps disclosed no information in any way implicating the defendant here, we conclude he has no standing to raise the question.

The problem presented is an aftermath of United States v. Giordano, ___ U.S. ___ and United States v. Chavez, ___ U.S. ___. The Mantello tap and the Mantello extension tap were authorized by the District Court for the District of Columbia Circuit upon an application which appeared regular upon its face and upon clear probable cause for it. The proceedings were defective under Giordano and Chavez, however, because the Executive Assistant to the Attorney General, rather than the Attorney General himself, was the authorizing officer. Thus anyone implicated by information obtained from the Mantello taps would have an apparent right to suppress the implicating

information under the provisions of the statute. 18 U.S.C.A. § 2518(10)(a).

Gibson, however, was not implicated in any way by information obtained by the Mantello taps. Informed of it at the time, he would clearly have had no standing to suppress information which contained no allusion to him or to his conduct.

The Mantello taps, however, did provide information which in substantial part supplied probable cause for an application for, and authorization of, a tap on the telephone of one Commings. This application was properly processed in the Department of Justice, duly authorized by the Attorney General himself, and the District Court for the District of Maryland authorized installation of the tap. The Commings tap provided information implicating Gibson, which Gibson would now have us suppress.

The only arrow for Gibson's bow is pointed at the regularity of the proceedings leading up to the Mantello taps. But with respect to those taps, he is not an "aggrieved person" within the meaning of the statute. 18 U.S.C.A. § 2518(10)(a). The clear implication of the statute is that an "aggrieved person" should not include one who is not implicated and against whom no one has made a proffer of information derived from the defectively authorized tap.

Nor does any generalized principle epitomized by the words "fruit of the poisonous tree" assist him. It is true that

the Commings tap may never have been authorized but for the earlier Mantello taps. Here, however, we deal not with fundamental constitutional rights, but with a technical procedural error in the Department of Justice which was readily correctible had its presence been recognized. It is not such a source of infection that one so remote as Gibson from it should be given standing to suppress information obtained from later taps upon the telephones of others as a result of proceedings in the Department of Justice which were not procedurally defective. If, in some circumstances, protection of important constitutional rights or the inhibition of police misconduct may require suppression of the "fruit of the poisonous tree," this is not such a case.

AFFIRMED.

APPENDIX C

FILED
JUN 5 1973
WILLIAM K. SLATE, II
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 72-1697

United States of America,

Appellee,

versus

James Nathaniel Gibson,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.

ORDER

In light of the similarities of the issues in this case with those in United States v. Giordano, 469 F.2d 522, cert. granted, 41 L.W. 3513 (March 27, 1973) and United States v. Chavez, ___ F.2d ___, 13 Cr. L. Rep. 2001, cert. granted, 41 L.W. 3613 (April 22, 1973), further action in this case will be postponed until the United States Supreme Court announces its decisions in Giordano and Chavez.

With the concurrence of Judges Craven and Widener.

FOR THE COURT:

Chief Judge, Fourth Circuit

A True Copy, T e s t e:

William K. Slate, II, Clerk

By Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	Criminal Nos.
v.	:	335-71
	:	336-71
LOUIS MANTELLO, et al.	:	337-71

MEMORANDUM AND ORDER

I

The defendants in each of the above numbered cases have moved to suppress wiretap evidence secured under order of a federal judge issued pursuant to Title 18 U.S.C. §2518 on application purportedly authorized by the Attorney General or his delegate under Title 18 U.S.C. §2516(1).

Involved are the following intercepts:

Intercept 1 (a) On October 29, 1970, U.S. District Judge John Pratt approved intercepts for (i) a telephone located in apartment 817, 1425 N Street, N.W., Washington, D.C. and (ii) a pay telephone located in the lobby of 1425 N Street, N.W.

(b) On November 13, 1970, Judge Pratt approved an extension of the intercept period on the two telephones noted in (a), *supra.*

Intercept 2 On November 25, 1970, U.S. District Judge Frank Kaufman approved intercepts on

two telephones located in apartment 1416, 8200 Wisconsin Avenue, Bethesda, Maryland.

Intercept 3 On December 10, 1970, U.S. District Judge John Pratt approved an intercept on a telephone located at 2737 Devonshire Place, N.W., Washington, D.C.

The application for a court order was in each case presented by Donald Campbell of the Department of Justice and in each application it was recited:

> "Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code the Attorney General of the United States the Honorable John N. Mitchell, has specially designated in this proceeding the Assistant Attorney General for the Criminal Division of the Department of Justice, the Honorable Will Wilson, to authorize affiant to make this application for an extension of an order authorizing the interception of wire communication."

Notwithstanding the foregoing representation, the record indicates as to Intercept 1(a), *supra*, that the original authorization for such intercept was not signed or initialed by the Attorney General but by one Sol Lindenbaum, his Executive Assistant. Lindenbaum in turn addressed a memorandum to Will Wilson, the Assistant Attorney General in Charge of the Criminal Division, reciting that Wilson was "specially designated" to authorize an application to the Court for the intercept order. However, Harold Shapiro, the Deputy Assistant Attorney General in the Criminal Division, and not Will Wilson, affixed Wilson's signature to an

authorization to Donald Campbell to make the application to the Court.

The same procedure was followed as to intercepts 1(b) and 3, *supra*, except that Henry Peterson, a Deputy Assistant Attorney General in the Criminal Division, affixed Will Wilson's signature to the authorization to Donald Campbell to make application to the Court for the intercept order. In other words, the application was processed through Lindenbaum to Peterson to Campbell and neither the Attorney General nor a specially designated Assistant Attorney General ever handled the papers.

As to Intercept No. 2, *supra* John N. Mitchell, then Attorney General, did in fact initial a memorandum to Will Wilson specially designating Wilson to exercise his powers to authorize application to the Court. However, Henry Peterson and not Will Wilson affixed Wilson's signature to the authorization to Campbell to apply to the Court for its order.

II

The defendants challenge the procedures followed in securing the authorization to intercept, alleging that such procedures violated the provisions of Title 18, Section 2516(1) which states:

> "*The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application* to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with Section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by

> the Federal Bureau of Investigation or a Federal agency having responsibility for investigation of the offense as to which the application is made . . ." 'emphasis supplied)

The government, while admitting the absence of authorization by the Attorney General or an Assistant Attorney General specially designated, (except for Intercept No. 2, *supra*), contends that the procedures followed in authorizing the intercepts were in substantial compliance with 18 U.S.C. §2516(1). The government argues that Sol Lindenbaum "stands in a special relationship to the Attorney General which makes him, in effect, the alter ego of the Attorney General." Accordingly, the government reasons that Sol Lindenbaum's approval of the intercepts involved in this case is essentially that of the Attorney General and that there has been no undermining of the legislative intent of the statute since responsibility for the authorization of the intercepts can still be traced to an identifiable political figure, the Attorney General.

Alternatively, the government asserts that even should the Court find the procedures employed here to be violative of 18 U.S.C. §2516(1), the violation is merely a "technical" one which should not warrant the application of the exclusionary rule.

III

1. *As to Intercepts 1(a), 1(b) and 3*

Having examined the affidavits filed by the government, and after hearing oral argument, the Court concludes that the procedures followed in authorizing intercepts 1(a), 1(b) and 3 clearly violated the terms of

18 U.S.C. §2516(1); and the Court further determines that all evidence derived from these illegal intercepts must be suppressed under 18 U.S.C. §2518(10).

In so ruling, the Court adopts the reasoning and conclusions of the Fifth Circuit in *United States v. Robinson*, ____ F.2d ____ No. 71-1058, (5th Cir., filed January 12, 1972,[1] in which the Fifth Circuit was faced with the identical question we face here. After an examination in depth of the legislative history of Section 2516(1), the Court concluded that the procedures followed severely undercut the congressional purpose in fixing responsibility for the authorization of intercepts in "a publicly responsible official subject to the political process." *Robinson, supra*, Slip Op. at 5-6.

Several federal district courts have relied on *Robinson* to suppress evidence secured through intercepts which were subject to the same procedural defect in the authorization process as that involved here. *United States v. Cihal*, ____ F.Supp. ____ , Criminal No. 71-61 (W.D. Pa., filed January 13, 1972); [2] *United States v. Focarile*, ____ Fed. Supp. ____ , Crim. No. 70-0483-M (D.Md., filed Feb. 22, 1972); *United States v. Aquino*, ____ Fed. Supp. ____, Crim No. 28578 (E.D. Mich., filed Jan. 17, 1972).[3] *Aquino* extended *Robinson* one step and held that the authorization for the extension of the properly authorized intercept must also be free of the procedural defect struck down in *Robinson*.[4]

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[1] Reported in 40 U.S.L.W. 2454

[2] Reported in 10 Cr. L. Reporter at 2378

[3] Reported in 10 Cr. L. Reporter at 2369

[4] On information and belief, Judge Becker, E.D. Pa., has also followed *Robinson*. Washington Post, p. A4, Mar. 25, 1972.

2. *As to Intercept No. 2*

The Court finds that the Attorney General personally approved the authorization of Intercept No. 2 in a memo initialed by him, addressed to Will Wilson, and, therefore, concludes that there was substantial compliance with the statute notwithstanding that Will Wilson did not sign personally.

Nonetheless, the Court concludes that the evidence secured from this intercept must be suppressed under the "fruit of the poisionous tree" doctrine since the affidavit in support of the application for this intercept is based almost entirely upon information obtained from intercepts 1(a) and 1(b) which this Court has found to be in violation of 18 U.S.C. §2516(1). *United States v. Iannelli*, ____ Fed. Supp. ____, (W.D. Pa., filed Feb. 16, 1972).[5]

Accordingly, it is by the Court this 29th day of March, 1972, ORDERED that the motions to suppress the contents of intercepts 1(a), 1(b), 2, and 3 and any evidence derived therefrom are granted.

/s/(illegible)
(illegible)
Judge

---

[5] Reported in 10 C.R.L. Reporter at 2435

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 72-169

UNITED STATES OF AMERICA,
Appellee

v.

JAMES NATHANIEL GIBSON,
Appellant

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.

STIPULATION

It is hereby stipulated by and between the United States and James Nathaniel Gibson as follows:

1. That the wire interception in issue before this Court was secured on the November 25th, 1970 order of the United States District Judge Frank Kaufman approving intercepts on two telephones located in apartment 1416, 8200 Wisconsin Avenue, Bethesda, Maryland.

2. That the above interception was derived directly and solely from evidence obtained from the following interceptions involved in *United States of America vs.*

Louis Mantello et al now on appeal from the United States District Court for the District of Columbia:

a. Intercepts for a telephone located in apartment 817, 1425 N Street, N. W., Washington, D. C. and a pay telephone located in the lobby of 1425 N Street, N. W., Washington, D. C. secured under a Court order of October 29, 1970 by United States District Judge John Pratt.

b. An extension of the intercept period on the two telephones noted in (a) supra approved under the order issued by Judge Pratt on November 13, 1970.

/s/ James Nathaniel Gibson
James Nathaniel Gibson

/s/ Joseph B. Bullock
Joseph B. Bullock
Counsel for Appellant

/s/ Henry B. Zachary
Henry B. Zachary
Counsel for Appellant

/s/ David H. Hopkins
David H. Hopkins
Assistant United States Attorney

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	Cr. No.
	:	335-71
LOUIS MANTELLO, *et al*	:	336-71
		337-71

AFFIDAVIT

District of Columbia:

Sol Lindenbaum being duly sworn deposes and says:

I have occupied the position of Executive Assistant to the Attorney General of the United States since April 11, 1967. I assist the Attorney General in the review of various matters which require his personal attention such as opinions, interpretations, decisions of the Board of Immigration Appeals, applications for pardon and other forms of Executive clemency, antitrust complaints, contracts, agreements, and proposed offers in compromise. See Title 28, Code of Federal Regulations, Section 0.6.

Attorney General John N. Mitchell refrained from designating any Assistant Attorney General to authorize, without his approval, the making of an application for an order permitting the interception of wire or oral

communications under Title 18, United States Code, Section 2516(1). Rather, he required that all requests for such authorization be referred to him for consideration. In the normal course of my duties, I review such requests and make recommendations to the Attorney General thereon. I have routinely reviewed such requests since February 1969 and, accordingly, became familiar with the applicable statutory requirements and the actions taken by Attorney General Mitchell on such requests. Also, in the course of my duties, I became familiar with Mr. Mitchell's signature and signed initials.

On October 28, November 12, November 24, and December 9, 1970, the Criminal Division of the Department of Justice transmitted to the Attorney General requests for approval of authorization to apply for interception orders with respect to certain telephones in Washington, D.C., and Bethesda, Maryland. The second request sought authorization to apply for an extension of the interception order obtained as a result of the first request. In each instance, the request was accompanied by copies of the proposed affidavit, application, and order, as well as a recommendation for approval from the Criminal Division.

On November 24, 1970, Attorney General Mitchell approved the request that authorization be given to make application for an interception order with respect to described telephones in Bethesda, Maryland. Attached is a copy of the Attorney General's personally initialed memorandum of that date to Will Wilson reflecting his approval of the request.

With respect to the recommendations of October 28, November 12 and December 9, 1970, in each instance I

reviewed the submitted material, concluded that the request satisfied the requirements of the statute and also concluded, from my knowledge of Attorney General Mitchell's actions on previous cases, that he would approve the request if submitted to him. Because the Attorney General was not available, I approved the request pursuant to the authorization which he had given to me to act in the circumstances and caused his initials to be placed on memoranda to Will Wilson. The memoranda approved the requests that authorization be given to make application for interception orders and constituted notification to the Criminal Division of the approval. Copies of the memoranda are attached.

/s/ SOL LINDENBAUM
SOL LINDENBAUM
Executive Assistant to the Attorney General
of the United States

Subscribed and sworn to before me
this 15th day of March, 1972.

/s/(illegible)
My Commission Expires August 31, 1976

UNITED STATES GOVERNMENT **DEPARTMENT**
MEMORANDUM **OF JUSTICE**

To : Will Wilson Date: Oct 28(illegible)
Assistant Attorney General JMM:PTW:lrt
Criminal Division

FROM : John N. Mitchell
Attorney General

Subject: *Interception Order Authorization*

This is with regard to your recommendation that authorization be given to Donald E. Campbell, an Assistant United States Attorney for the District of Columbia, to make application for an interception order under 18 U.S.C. 2518, permitting the interception of wire communications for a fifteen (15) day period to and from two telephones bearing numbers 332-4297 and 234-9598, respectively. Telephone number 332-4297 is subscribed to by Lee Wheeler and located in apartment number 817, 1425 N Street, N.W., Washington, D. C. and telephone number 234-9598 is a public coin operated telephone located in the lobby of the apartment building at 1425 N Street, N.W., Washington, D. C. The requested authorization involves the investigation into possible violations of 18 U.S.C. 1034, 1952, and 371 by Louis Mantello and others as yet unknown.

Pursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, you are hereby

specially designated to exercise those powers for the purpose of authorizing Donald E. Campbell to make the above-described application.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	Cr. No. 335-71
v.	:	336-71
	:	337-71
LOUIS MANTELLO, *et al.*	:	

AFFIDAVIT

District of Columbia:

Harold P. Shapiro, being duly sworn, deposes and says:

At the times of the events related in this affidavit, I was a Deputy Assistant Attorney General in the Criminal Division of the United States Department of Justice.

This affidavit describes the processing within the Criminal Division of the Department of Justice of a request for authorization to make application to a Federal Court for a wire interception order with respect to certain telephones in Washington, D.C. in connection with an investigation involving Louis Mantello, and others.

The formal request for authorization to apply for a wire interception order in this matter was made by the

Director of the Federal Bureau of Investigation on October 26, 1970. Prior to action on the request, its accompanying file containing copies of the proposed affidavit, application, and order was examined in a special Unit of the Organized Crime and Racketeering Section of the Criminal Division by an attorney whose primary function was to scrutinize the entire matter for form and substance with particular emphasis on assuring strict adherence to the required statutory, judicial, and Constitutional standards. The attorney handling the matter, Philip T. White, of that Unit, examined the file and recommended favorable action on the request. The file was then submitted for review to William S. Synch, Chief of the Organized Crime and Racketeering Section, who recommended approval and sent the file to me. I reviewed the file and forwarded it to the Office of the Attorney General with a recommendation that the authorization be granted. Following approval in the Office of the Attorney General, the Criminal Division dispatched the letter dated October 28, 1970, to Donald E. Campbell advising him that he was authorized to present the application to the court.

I signed Will Wilson's name to the letter in accordance with the authorization of Will Wilson and the standard procedures of the Criminal Division. I regarded the signing of Will Wilson's name as a ministerial act, because Will Wilson had authorized me to sign his name to and dispatch such a letter of authorization in every instance in which the request had been favorably acted upon in the Office of the Attorney General. Will Wilson did not examine the file. Attached is a copy of Will Wilson's affidavit of

September 15, 1971, respecting an authorization letter dated June 16, 1969, in which he stated that he had authorized me to sign letters of this nature.

/s/ HAROLD P. SHAPIRO
HAROLD P. SHAPIRO
Deputy Assistant Attorney General
Criminal Division

Subscribed and sworn to before me
this 14th day of March, 1972.

/s/(illegible)
My Commission Expires August 31, 1976

APPENDIX H

UNITED STATES GOVERNMENT **DEPARTMENT**
MEMORANDUM **OF JUSTICE**

To :Will Wilson
Assistant Attorney General
Criminal Division
Date: (illegible)

FROM : John N. Mitchell
Attorney General

SUBJECT: *Extension of Interception Order Authorization*

This is with regard to your recommendation that authorization be given to Donald E. Campbell, an Assistant United States Attorney for the District of Columbia, to make application for an extension of an interception order under 18 U.S.C 2518, permitting the continued interception of wire communications for a fifteen (15) day period to and from two telephones bearing numbers 332-4297 and 234-9598, respectively. Telephone number 332-4297 is subscribed to by Lee Wheeler and located in Apartment Number 817, 1425 N Street, N.W., Washington, D.C. and telephone number 234-9598 is a public coin operated telephone located in the lobby of the apartment building at 1425 N Street, N.W., Washington, D.C. The requested authorization involves the investigation into possible violations of 18 U.S.C. 1084, 1952, and 371 by Louis Mantello and others as yet unknown.

Pursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise those powers for the purpose of authorizing Donald E. Campbell to make the above-described application.

APPENDIX I
IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	Crim. No.
	:	335-71
v.	:	336-71
	:	337-71
LOUIS MANTELLO, *et al.*	:	

AFFIDAVIT

Henry E. Peterson, being duly sworn, deposes and says:

I am Assistant Attorney General in charge of the Criminal Division. At the times of the events related in this affidavit, I was a Deputy Assistant Attorney General in the Criminal Division, United States Department of Justice.

This affidavit describes the processing within the Criminal Division of the Department of Justice of three requests for authorization to make application to a Federal court for wire interception orders. The first related to certain telephones in Washington, D.C. in connection with an investigation involving Louis Mantello and others and was for an extension of a previously authorized interception. The second pertained to two telephones in Bethesda, Maryland, in an investigation implicating John Constantine Commings and others. The third identified one telephone in

Washington, D.C., involved in an investigation implicating Mary A. Bringley and others.

The formal request for authorization to apply for the second and third of the mentioned interception orders were made by the Director of the Federal Bureau of Investigation on November 23 and December 8, 1970. The request for the extension emanated from personnel involved in the investigation to which it pertained. Prior to action on each request, its accompanying file, which included copies of the proposed affidavit, application, and order, was examined in a special unit of the Organized Crime and Racketeering Section of the Criminal Division by an attorney whose primary function was to scrutinize the entire matter for form and substance with particular emphasis on assuring strict adherence to the required statutory, judicial, and Constitutional standards. The attorney handling all of the requests, Philip T. White, of that Unit, examined the files and recommended favorable action on the requests. The files were then submitted for review: the first and second to Kurt W. Muellenberg, a Deputy Chief of the Organized Crime and Racketeering Section, and then to William S. Lynch, Chief of that Section; the third to James J. Featherstone, a Deputy Chief of the Organized Crime and Racketeering Section; who recommended approval of the respective requests. Following these examinations and reviews, each file, in turn, was sent to me. I reviewed each file and forwarded it to the Office of the Attorney General with recommendation that the authorization be granted. Following approval in the Office of the Attorney General, the Criminal Division dispatched the letters dated November 12, November 24, and December 9,

1970, to Donald E. Campbell advising him that he was authorized to present the application to the court.

I signed Will Wilson's name to the letters in accordance with the authorization of Will Wilson and the standard procedures of the Criminal Division. I regarded the signing of Will Wilson's name as a ministerial act, because Will Wilson had authorized me to sign his name to and dispatch such a letter of authorization in every instance in which the request had been favorably acted upon in the Office of the Attorney General. Will Wilson did not examine any of the files. Attached is a copy of Will Wilson's affidavit of September 15, 1971, respecting an authorization letter dated June 16, 1969, in which he stated that he had authorized me to sign letters of this nature.

/s/ HENRY E. PETERSEN
HENRY E. PETERSEN
Assistant Attorney General
Criminal Division

Subscribed and sworn to before me
this (illegible) day of March, 1972.

/s/(illegible)
My Commission Expires August 31, 1976

APPENDIX J

ARGUMENT III

Statutory scheme of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 is a two step process. The first invokes the Congressional intent behind Title 18 U.S.C. Section 2516(1) and the second, equally important as the first, the Congressional intent behind Title 18 U.S.C. Section 2518. The wire intercept evidence against Appellant, without being the fruit of the poisonous tree, was obtained in violations of both of these sections.

The first step becomes evident from an examination of the Congressional intent behind 2516(1) as set forth in Argument I, which concerns itself with the status of the person initiating the authorization to apply for the court order. The framers of Title III realized that Section 2516(1) dealt only with the *fact of authorization* of the application and not with disclosure of the identity of the person who actually authorized the application to the Judge before whom the application was presented or to others to whom the content of the Judge's orders would be shown. *United States v. Focarile* 340 F Supp. at 1054 - 1056. Congress enacted 2518(1)(a) to ensure that the application identify the officer authorizing the application and 2518(4)(d) to ensure that the court order identify the person authorizing the application. Hence the second step of the statutory scheme requires the identity of

the person who authorized the application be made known to the Judge and ultimately through his order to any person who is a party to a proceeding in which the contents of intercepted communications or the fruits therefrom are offered into evidence. *Focarile supra*

An enlightening source of legislative history is again contained in Senate Report 1097 supra. In referring to 2518(1)(a) the report states:

"Subparagraph (a) requires the identity of the person who makes and the person who authorized the application to be set out. This fixes the responsibility."

In explaining Section 2518(4), (d) the report states:

"Subparagraph (d) requires that the order note the agency authorized to make the application and the person who authorized the application so that responsibility will be fixed."

In applying the two prong test of the statutory scheme of Title III to the Commings Tap, it is necessary to examine the relevant documents. These documents are (1) the memorandum of November 24, 1970 personally initialed by the Attorney General himself and reciting that Will Wilson was "specially designated" to authorize Donald Campbell to make an application to the court for an order authorizing the *Commings Tap* (R.32) (APP. 23), (2) the application submitted on November 25, 1970 by Campbell to Judge Frank A. Kaufman (APP. 24) and (3) Judge Kaufman's order of November 25, 1970 authorizing the *Commings Tap* (APP. 29). The pertinent parts of Campbell's

application and Judge Kaufman's order are set forth below under appropriate headings.

Campbell's Application

"Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated in this proceeding the Assistant Attorney General for the Criminal Division of the Department of Justice, the Honorable Will Wilson, to authorize affiant (Campbell) to make this application for an order authorizing the interception of wire communications."

Judge Kaufman's Order

"Wherefore, it is hereby ordered that: Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized pursuant to application authorized by the Assistant Attorney General for the Criminal Division of the Department of Justice, the Honorable Will Wilson, who has been specially designated in proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the powers conferred on the Attorney General by Section 2516 of Title 18 United States Code to:"

The important questions presented by the documents relevant to the *Commings Tap* are (1) Whether the November 24, 1970 memorandum is itself an authorization of the Campbell application or a designation of Will Wilson to exercise the powers and discretion conferred by statute upon the Attorney General or an Assistant Attorney specially designated by the Attorney General and (2) Whether the misidentification in both

the application and order of the person who *actually authorized the application* is an impermissible violation of or substantial compliance with the statutory mandates of Sections 2518(1)(a) and 2518(4)(d) of Title 18, United States Code.

The Appellant's response to the first question is that the plain meaning of the words in the November 24, 1970 memorandum is that Will Wilson was specially designated in this case to exercise the power and discretion conferred by statute upon the Attorney General or upon an Assistant Attorney General specially designated by him to authorize the application for an order of court. This memorandum is not an authorization to anyone to apply to Judge Kaufman for an order. *United States v. Casale* 341 F. Supp. 374 (1972)[3]

To substantiate this argument, when Will Wilson received the November 24, 1970 memorandum initialed by the Attorney General, he on the same day sent a letter to Donald E. Campbell authorizing him to apply for wire interception implicating John Constantine Commings. A literal reading of the third paragraph of Will Wilson's letter to Campbell indicates clearly that he was under the impression that the Attorney General had specially delegated him to authorize the application. (See APP. 32) Under this view, the contents of the *Commings Tap* which is the evidence against the Appellant in this case was obtained in violation of

[3] See cf. *United States v. Cihal* 336 F. Supp. 261 (1972) with dictum to the effect that similar memorandum was itself the authorization of application. *United States v. Pisacano* (2nd Cir. Filed April 7, 1972) reported in 11 Cr. L. Reporter at 2081 holding that personally initialed memorandum by the Attorney General clearly complied with Section 2516(1).

2516(1)—the first step of the statutory scheme of Title III.

Assuming that the November 24, 1970 memorandum is itself a proper authorization of the application for the court order for the *Commings Tap*, still the application itself and the court order permitting this tap clearly violated the second step of the statutory scheme of Title III as set forth in Sections 2518(1)(a) and 2518(4)(d) of Title 18 of the United States Code. The second step is of equal dignity to the first because if the only important fact were that one of the persons given the power to act under Section 2516(1) had in fact authorized the application, it would not have been necessary for Congress to enact the additional provisions of Section 2518 to require the identity of the acting official to be set forth in the application and order *United States v. Focarile* 340 F. Supp. at 1057.

Both the application and the order for the *Commings Tap* misidentify the person who actually authorized the application because there are only two points of view to be taken with regard to the factual circumstances surrounding this particular authorization. The two view points necessarily are (1) that the Attorney General himself authorized the application for the *Commings Tap* and (2) that the specially designated Assistant Attorney General authorized the application for this tap.

Under either viewpoint, the person who actually authorized the application was misidentified in both the application and order. In the case of authorization of the application by the Attorney General himself, the application misidentifies Will Wilson as the specially

designated "officer authorizing the application". Section 2518(1)(a). In the case of authorization by the specially designated Assistant Attorney General, the truth is that Henry Peterson and not Will Wilson authorized the application. Hence the application misidentifies Wilson as *the officer authorizing the application.* (See pertinent part of application set forth above). The order is the mirror of the application and reflects the same misidentification as the application. (See pertinent part of order also set forth above).

These misidentifications in both the order and application are obvious violations of the statutory mandate expressed in Section 2518(4)(d) requiring the order to specify "The identity —— of the person authorizing the application and Section 2518(1)(a) requiring each application to include information about "the identify [sic] —— of the officer authorizing the application. The misrepresentation in the application and order of the identity of the person who actually authorized the application circumvents the intent of Congress to "fix responsibility" as expressed in Senate Report 1097 Supra. On the issue of correctly identifying the person who authorized the application, it is irrelevant whether the memorandum of November 24, 1970 is itself an authorization of the application for the *Commings Tap* or a designation of Will Wilson to authorize this Tap because in either event the application and order misrepresents the identity of the person who actually authorized the application.

The procedures adopted and followed in obtaining the wire intercept evidence against the Appellant fail to satisfy the statutory mandates of Sections 2516(1) and 2518 for three reasons:

1. Neither the Attorney General nor Assistant Attorney General specially designated by him authorized the application to Judge Kaufman.

2. Campbell's application did not identify correctly the officer authorizing the application presented to Judge Kaufman.

3. The court order entered by Judge Kaufman did not correctly identify the officer authorizing the application *United States v. Cascle* supra.

Strict construction of the relevant statutory mandates and the two prong test of the statutory scheme of Title III require that the statutory violations which have occurred in obtaining the wire intercept evidenced against the appellant be deemed impermissible and substantial violations.

APPENDIX K
ARGUMENT I

Legislative history of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 in 18 U.S.C. Section 2516(1) shows the intent of Congress to limit to the Attorney General or any Assistant Attorney General specially designated by him the power to authorize an application to intercept wire communications. The intercept applications involved in the Mantello Taps were neither authorized by the Attorney General or any specially designated Assistant Attorney General and were, thus, clear violations of Section 2516(1).

The expressed terms and legislative history of Section 2516(1) show a Congressional intent to narrowly circumscribe the power to authorize an application to obtain a court order for a wire interception to the Attorney General or an Assistant Attorney General specially granted authority to act by the Attorney General. The predecessor to Section 2516(1) was presented in 1961 to the First Session of the 87th Congress and as proposed originally in S. 1495 Section 4(b) granted the power to authorize an application for judicial leave to intercept wire communication to "The Attorney General or any officer of the Department of Justice of any United States Attorney specially designated by the Attorney General". In May, 1961, Herbert J. Miller, Jr. then Assistant Attorney General, Criminal Division testified on S. 1495 and in accordance with Mr. Miller's suggested amendment, the Department of Justice on June 21, 1961 submitted a proposed revision to S. 1495 which granted power to authorize

an application for a court order to intercept wire communications to, "The Attorney General or any Assistant Attorney General of the Department of Justice specially designated by the Attorney General" see *United States v. Focarile* 340 F. Supp. at 1053(1972).

The revision to S. 1495 proposed by the Department of Justice in 1961 was included in every major subsequent legislative proposal and was finally enacted in Title III as 18 U.S.C. 2516(1) in 1968.[2] The most significant source of legislative history is contained in the April 29, 1968 Senate Report 1097. This report which was made by the Senate Judiciary Committee which had under its consideration all of the various proposals, including those from the House, recommended passage by the Senate of S. 917 which contained the text of Title III as it was finally enacted. In referring to Section 2516(1) the report states:

> Paragraph (1) provides that the Attorney General or any Assistant Attorney General of the Department of Justice specially designated by him may authorize an application for an order authorizing the interception of wire or oral communications. This provision centralizes in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronic surveillance techniques. Centralization will avoid the possibility that divergent practices might develop. Should abuses occur, the lines of

[2] See United States v. Forcarile for thorough examination of subsequent legislative proposals, supra 1054-1056.

> responsibility lead to an identifiable *person*. This provision in itself should go a long way toward guaranteering that no abuses will happen (Emphasis supplied) *1968 U.S. Code Cong. & Admin. News p. 2185.*

It is clear as to Section 2516(1) that Congress intended to place the authority to make the decision to authorize an application to intercept wire communications in the highest levels of government and also in a specific identifiable person who is a publicly responsible official subject to the political process. In the instant case, the applications for the Mantello Taps were handled neither by the Attorney General nor *any* Assistant Attorney General and were before being purportedly authorized never brought to the personal attention of either the Attorney General or the Assistant Attorney General purportedly designated by the Attorney General. In the case of the *Mantello Tap*, Sol Lindenbaum specially designated Will Wilson and Harold Shapiro affixed Wilson's name to the letter authorizing the interceptions. In the case of the *Mantello Extention Tap* Sol Lindenbaum again specially designated Will Wilson and Henry Peterson affixed Wilson's name to the letter authorizing the interception. Neither Sol Lindenbaum, the Executive Assistant to the Attorney General nor Harold Shapiro, Deputy Assistant Attorney General or Henry Peterson, also a Deputy Assistant Attorney General, fall within the narrow statutory orbit prescribed by Section 2516(1).

Not only are the *Mantello Taps* clear violations of 2516(1), but also the Congressioanl intent as expressed in United States v. Robinson ____ Fed2d ____ No.

71-1058 (5th Cir., Filed January 12, 1972), "to make certain that every such matter would have the personal attention of an individual appointed by the President and confirmed by the Senate" *United States v. Cahil* 336 F. Supp. 261(1972), *United States v. Aquino* 338 F. Supp. 1080 (1972) *United States v. Mantello et al* (See Memorandum and Order by Judge Corcoran, filed May 29, 1972, United States District Court for the District of Columbia. (APP. 4-9)

The Government argues as statutory support for the delegation of the Attorney General's power to Mr. Lindenbaum or to Mr. Peterson and Mr. Shapiro that if Congress had desired the authority in question to be non-delegable, it would have expressly stated so in the manner that it did in 18 U.S.C. 254 Section 101, Pub. Law 90-284, Civil Rights Act of 1968:

> "No prosecution of any offense described in this Section shall be undertaken by the United States except *upon the certification in writing of the Attorney General or the Deputy Attorney General* that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, *which functions of certification may not be delegated.* (Emphasis added)

The Government has abandoned its claim of delegation under 28 U.S.C. Seciton 510 as advanced in the *Robinson* case (R. 17, 18) (APP. 20, 21)

United States v. Narducci 341 F. Supp. at 1115 rejected this very argument on the grounds that the above section cannot be deemed to be part of the legislative history of Title III and that the argument proves too much since "the power to initiate wiretaps

could then be delegated to anyone in the Justice Department which is clearly an untenable position in light of the legislative history of Title III". (APP. 20-21) The Government also argues (R. 18, 19) (APP. 21-22) that Mr. Lindenbaum stands in a special relation to the Attorney General which makes him in effect the "alter ego" of the Attorney General with respect to these matters when the Attorney General is not available and that he satisfies the statutory command because there is in the person of Mr. Lindenbaum a centralized repository for the application of a consistent policy towards wire interception. *Narducci* also rejects this argument on the ground that Congress deemed the implementation of the awesome power to initiate the wiretap process to be a matter of high national policy. "Accordingly the approval of Mr. Lindenbaum, not an official subject to the political process does not fill the Congressional bill." The alter ego argument could be extended to anyone whom the Government determines qualifies as the "alter ego".

APPENDIX L

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Nov. 24, 1970

Will Wilson
Assistant Attorney General
Criminal Division

John N. Mitchell
Attorney General

Interception Order Authorization

This is with regard to your recommendation that authorization be given to Donald E. Campbell, an Assistant United States Attorney for the District of Columbia, to make application for an interception order under 18 U.S.C. 2518, permitting the interception of wire communications for a fifteen (15) day period to and from two telephones bearing numbers 652-1277 and 652-1278, respectively. The two telephones are subscribed to by Mrs. Nicole Hadley and located in Apartment Number 1416, 8200 Wisconsin Avenue, Bethesda, Maryland. The requested authorization involves the investigation into possible violations of 18 U.S.C. 1084, 1952, and 371 by John Constantine Commings, Louis Mantello and others as yet unknown.

Pursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise those powers for the purpose of authorizing Donald E. Campbell to make the above-described application.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS

APPLICATION

Donald E. Campbell, an Assistant United States Attorney for the District of Columbia being duly sworn states:

This sworn application is submitted in support of an order authorizing the interception of wire communications. This application has been submitted only after lengthy discussion concerning the necessity for such an application with George Beall, the United States Attorney for the District of Maryland and with various officials of the Organized Crime and Racketeering Section, Department of Justice, Washington, D.C., together with agents of the Federal Bureau of Investigation.

1. He is an "investigative or law enforcement officer —of the United States" within the meaning of Section 2510(7) of Title 18, United States Code, that is, he is an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18, United States Code.

2. Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated in this proceeding the Assistant Attorney General for the Criminal Division of the Department of Justice, the Honorable Will Wilson, to authorize affiant to make this application for an order authorizing the interception of wire communication. The letter of designation in this proceeding is attached to this application as Exhibit A and the letter of authorization

signed by the Assistant Attorney General is attached to this application as Exhibit B.

3. This application seeks authorization to intercept wire communications of John Constantine Commings, Louis Mantello and others as yet unknown concerning offenses enumerated in Section 2516 of Title 18, United States Code, that is, offenses involving the use of interstate telephone communication facilities for the transmission of bets and betting information and in aid of a racketeering enterprise (gambling), in violations, respectively, of Sections 1084 and 1952 or Title 18, United States Code, and a conspiracy to commit such offenses in violation of Section 371 of Title 18, United States Code, which have been committed and are being committed by John Constantine Commings, Louis Mantello and others as yet unknown.

4. He has discussed all the circumstances of the above offenses with Special Agent Bernard A. DeSantis, of the Washington Field Office of the Federal Bureau of Investigation who has directed and conducted the investigation herein, and has examined the affidavit of Special Agent Bernard A. DeSantis (attached to this application as Exhibit C and incorporated by reference herein) which alleges the facts therein in order to show that:

(a) there is probable cause to believe that John Constantine Commings, Louis Mantello and others as yet unknown have committed and are committing offenses involving the use of interstate telephone communication facilities for the transmission of bets and betting information and in aid of a racketeering enterprise (gambling), in violation, respectively, of Sections 1084 and 1952 of Title 18, United States Code.

(b) there is probable cause to believe that particular wire communications concerning these offenses will be obtained through the interception, authorization for which is herewith applied for. In particular, these wire communications will concern the

receipt and dissemination of "line" information by John Constantine Commings, Louis Mantello and others as yet unknown and the receipt and placing of bets on sporting events by John Constantine Commings, Louis Mantello and others as yet unknown.

(c) normal investigative procedures reasonably appear to be unlikely to suceed.

(d) there is probable cause to believe that the two telephones subscribed to by Mrs. Nicole Hadley and located in Apartment Number 1416, 8200 Wisconsin Avenue, Bethesda, Maryland, and carrying telephone numbers 652-1277 and 652-1278, respectively, have been and are being used by John Constantine Commings and others as yet unknown in connection with the commission of the above-described offenses.

5. On October 29, 1970, the Honorable John H. Pratt, Judge, United States District Court, District of Columbia, signed an order permitting the Federal Bureau of Investigation to intercept wire communications to and from telephone number 332-4297, located in Apartment Number 817, 1425 N Street, N.W., Washington, D.C., and to intercept wire communications to and from public telephone number 234-9598, located in the lobby of the apartment building at 1425 N Street, N.W., Washington, D.C., when said telephone was being used by Louis Mantello. The authorized period of interception was fifteen (15) days. On November 13, 1970, Judge Pratt signed an order permitting the Federal Bureau of Investigation to continue to intercept wire communications to and from telephone numbers 332-4297 and 234-9598 for an additional fifteen (15) day period. On November 19, 1970, the Honorable Anothony T. Augelli, Chief Judge, United States District Court, District of New Jersey, signed an order permitting the Federal Bureau of Investigation to intercept wire communications to and from six (6) telephones in West New York, New Jersey.

The affidavit in support of the application for that order was based primarily on information obtained from the interception of communications of Louis Mantello while using the pay telephone at 1425 N Street, N.W., Washington, D.C. There is no indication that John Constantine Commings will be intercepted on any of the six telephones in New Jersey or that any of the people involved in Commings' gambling operation or dealing with Commings will be intercepted on any of the six telephones in New Jersey with the exception of Louis Mantello. No other application has been made to any Judge for authorization to intercept or for approval of interception of wire or oral communications involving any of the same persons, facilities, or places specified herein.

WHEREFORE, your affiant believes that probable cause exists to believe that John Constantine Commings, Louis Mantello and others as yet unknown are engaged in the commission of offenses involving the use of interstate telephone communication facilities for the transmission of bets and betting information and in aid of a racketeering enterprise (gambling) and a conspiracy to do so; that John Constantine Commings and others as yet unknown have used, and are using the two telephones subscribed to by Mrs. Nicole Hadley, located in Apartment Number 1416, 8200 Wisconsin Avenue, Bethesda, Maryland, and bearing numbers 652-1277 and 652-1278, respectively, in connection with the commission of the above-described offenses; that communications of John Constantine Commings, Louis Mantello and others as yet unknown concerning these offenses will be intercepted to and from the above-described two telephones; and that normal investigative procedures appear unlikely to succeed.

On the basis of the allegations contained in this application and on the basis of the affidavit of Special Agent Bernard A. DeSantis, which is attached hereto and made a part hereof, affiant requests this court to

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Attachment # 1

issue an order, pursuant to the power conferred on it by Section 2518 or Title 18, United States Code, authorizing the Federal Bureau of Investigation of the United States Department of Justice to intercept wire communications to and from the above-described two telephones until communications are intercepted which reveal the manner in which John Constantine Commings, Louis Mantello and others as yet unknown participate in the illegal use of interstate telephone facilities for the transmission of bets and betting information and in aid of a racketeering enterprise (gambling) and which reveal the identities of his confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of fifteen (15) days from the date of that order, whichever, is earlier.

/s/ Donald E. Campbell
DONALD E. CAMPBELL
Assistant United States Attorney
District of Columbia

Subscribed and Sworn before me this 25th day of November, 1970 at _____

/s/ Frank A. Kaufman
FRANK A. KAUFMAN
United States District Judge
District of Maryland

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS

No. 747

ORDER

AUTHORIZING INTERCEPTION
OF WIRE COMMUNICATIONS

TO: Special Agents of the Federal Bureau of Investigation, United States Department of Justice

Application under oath having been made before me by Donald E. Campbell, an Assistant United States Attorney for the District of Columbia, and an "investigative or law enforcement officer" as defined in Section 2510(7) of Title 18, United States Code, for an order authorizing the interception of wire communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the court finds:

(a) there is probable cause to believe that there is additional evidence that John Constantine Commings and others as yet unknown have committed and are committing offenses in violation of 1084, 1952 and 371 of Title 18, United States Code, which can be obtained by the interception, authorization for which is herewith applied for.

(b) there is probable cause to believe that particular wire communications concerning these offenses will be obtained through the interception, authorization for which is herewith applied for. In particular, these wire communications will concern the

dissemination of "line" information by John Constantine Commings, Louis Mantello and others as yet unknown and the receipt and placing of bets on sporting events by John Constantine Commings, Louis Mantello and others as yet unknown.

(c) normal investigative procedures reasonably appear to be unlikely to succeed to obtain the additional evidence which there is probable cause to believe will be obtained through the interception, authorization for which is herewith applied for.

(d) there is probable cause to believe that the two telephones subscribed to by Mrs. Nicole Hadley and located in Apartment Number 1416, 8200 Wisconsin Avenue, Bethesda, Maryland, and carrying telephone numbers 652-1277 and 652-1278, respectively, have been and are being used by John Constantine Commings and others as yet unknown in connection with the commission of the above-described offenses.

WHEREFORE, it is hereby ordered that:

Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized, pursuant to application authorized by the Assistant Attorney General for the Criminal Division of the Department of Justice, the Honorable Will Wilson, who has been specially designated in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the powers conferred on the Attorney General by Section 2516 of Title 18, United States Code, to:

(a) intercept wire communications of John Constantine Commings and others as yet unknown to and from the two telephones subscribed to by Mrs. Nicole Hadley and located in Apartment Number 1416, 8200 Wisconsin Avenue, Bethesda, Maryland, and bearing telephone numbers 652-1277 and 652-1278, respectively.

(b) such interception shall not automatically terminate when the type of communications described above in paragraph (b) of page 2 have first been obtained, but shall continue until communications are intercepted which reveal the manner in which John Constantine Commings, Louis Mantello and others as yet unknown participate in the illegal use of interstate telephone facilities for the transmission of bets and betting information and in aid of a racketeering enterprise (gambling) and which reveal the identities of his confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of fifteen (15) days from the date of this order, whichever is earlier.

PROVIDING THAT, this authorization to intercept wire communications shall be executed as soon as practicable after signing of this order and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18 of the United States Code, and must terminate upon attainment of the authorized objective or, in any event, at the end of fifteen (15) days from the date of this order.

PROVIDING ALSO THAT, Donald E. Campbell shall provide the court with a report on the 5th and 12th days following the date of this order showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

/s/ Frank A. Kaufman
FRANK A. KAUFMAN
Judge

Date--Nov. 25, 1970—Time _____.

Attachment # 2

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Nov. 24, 1970

Mr. Donald E. Campbell
Assistant United States Attorney
District of Columbia
Washington, D.C.

Dear Mr. Campbell:

This is with regard to your request for authorization to make application pursuant to the provisions of Section 2518 of Title 18, United States Code, for an order of the court authorizing the Federal Bureau of Investigation to intercept wire communications to and from two telephones bearing numbers 652-1277 and 652-1278, respectively. The two telephones are subscribed to by Mrs. Nicole Hadley and are located in Apartment Number 1416, 8200 Wisconsin Avenue, Bethesda, Maryland. The requested authorization involves violations of 18 U.S.C. 1084, 1952, and 371 by John Constantine Commings, Louis Mantello and others as yet unknown.

I have reviewed your request and the facts and circumstances detailed therein and have determined that probable cause exists to believe that John Constantine Commings, Louis Mantello and others as yet unknown have committed and are committing offenses enumerated in Section 2516 of Title 18, United States Code, to wit: violations of Sections 1084, 1952, and 371 of Title 18, United States Code. I have further determined that there exists probable cause to believe that the above persons will make use of the above-described two telephones in connection with those offenses, that wire communications concerning the offenses will be intercepted, and that normal investigative procedures are unlikely to succeed.

Accordingly, you are hereby authorized under the power specially delegated to me in this proceeding by

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Attachment # 3

the Attorney General of the United States, the Honorable John N. Mitchell, pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, to make application to a judge of competent jurisdiction for an order pursuant to Section 2518 of Title 18, United States Code, authorizing the Federal Bureau of Investigation to intercept wire communications from the above-described two telephones for a period of fifteen (15) days.

Sincerely,

WILL WILSON
Assistant Attorney General

Attachment # 3

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-378

JAMES NATHANIEL GIBSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in holding that he does not have standing to make the claim that two wire interceptions were invalid under *United States* v. *Giordano*, 416 U.S. 505. The interceptions admittedly had no connection with and in no way implicated petitioner, but supplied probable cause for the interception of two telephones of another person to whom petitioner transmitted wagering information.

After a nonjury trial upon stipulated facts (Pet. App. A, pp. 3a-5a) in the United States District Court for the Eastern District of Virginia, petitioner was convicted of interstate transmission of wagering information, in violation of 18 U.S.C. 1084. Petitioner was sentenced to a term of two years' imprisonment and fined $5,000. The court of appeals affirmed (Pet. App. B; 500 F.2d 854).

The evidence supporting petitioner's conviction was obtained from a court-authorized wire interception of gambling conversations over two telephones used by one

John Commings and located in Bethesda, Maryland (hereinafter "Commings interception") (Pet. App. L, p. 8*l*). Although petitioner was not a target of this interception (Pet. App. L, p. 3*l*), his communications were intercepted when he transmitted wagering information from Alexandria, Virginia, to one of the Commings telephones in Bethesda, Maryland (Pet. App. A, pp. 4a-5a). Probable cause for this interception was obtained in part from court-authorized interception of two different telephones in Washington, D.C., used by one Louis Mantello (hereinafter "Mantello interceptions"). Although the Mantello interceptions were court authorized and supported by probable cause, the application had been authorized by the executive assistant to the Attorney General and hence the interceptions were not in compliance with Title III (Pet. App. B, p. 2b). *United States* v. *Giordano,* 416 U.S. 505. The Mantello interceptions, however, as petitioner concedes, had no connection with him, and he was in no way implicated by evidence derived from those interceptions (Pet. 14).

Petitioner challenges the Commings interception on the ground that probable cause therefor was obtained from the Mantello interceptions (Pet. App. B, p. 2b).[1] However, the court of appeals correctly held that petitioner had no standing to raise the *Giordano* defect

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[1]Petitioner concedes (Pet. 15) that the circumstances surrounding the authorization of the Commings application are identical to those which were at issue in *United States* v. *Chavez,* 416 U.S. 562, namely, that although the application had been authorized by the Attorney General, the application and order misidentified the authorizing officer as an Assistant Attorney General. Petitioner contends (Pet. 7-11), however, that *Chavez* should be overruled because the Court, by interpreting Title III to require suppression of evidence only in cases of serious statutory

in the Mantello interceptions. Although there is a causal connection between the Mantello and Commings interceptions, suppression of evidence "can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Alderman* v. *United States*, 394 U.S. 165, 171-172.[2] The *Giordano* defect affected only the Mantello intercep-

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violations, violated the doctrine of separation of powers. However, "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function," *United States* v. *American Trucking Associations*, 310 U.S. 534, 544, and the Court in *Giordano* did no more than construe 18 U.S.C. 2518(10)(a)(i) in accordance with well settled rules of statutory construction. See *United States* v. *American Trucking Associations, supra*, 310 U.S. at 542-544; *Platt* v. *Union Pacific Railroad Co.*, 99 U.S. 48, 58. The cases cited by petitioner (Pet. 12) for the proposition that penal statutes should be strictly construed are inapposite. The Court in *Giordano* was not construing a penal statute, but rather one that regulates the government's use of an investigative tool.

[2]Although the Court there was discussing standing to raise Fourth Amendment violations, it is clear that Congress intended the same rules of standing to apply to motions to suppress evidence derived from Title III interceptions. S. Rep. No. 1097, 90th Cong., 2d Sess., p. 91; *Alderman* v. *United states, supra*, 394 U.S. at 175, n. 9.

tions, but petitioner was not a target of them, and his conversations were not intercepted during their course. Therefore, since the Mantello interceptions did not violate petitioner's rights, he has no standing to raise the illegality of that overhearing in connection with his motion to suppress evidence derived from the Commings interception. Cf. *Dearinger* v. *Rhay*, 421 F. 2d 1086, 1088 (C.A. 9).

While it is true that petitioner would not have been overheard but for the Mantello interceptions, this amounts simply to the contention that he would not have been overheard but for the violation of Mantello's rights, and it is axiomatic that one may not seek to suppress evidence on the ground that it was derived from the violation of someone else's rights. *United States* v. *Calandra,* 414 U.S. 338, 348; *Brown* v. *United States*, 411 U.S. 223, 229-230; 348; *Alderman* v. *United States, supra*, 394 U.S. at 171-172; *Wong Sun* v. *United States*, 371 U.S. 471, 492; *Goldstein* v. *United States*, 316 U.S. 114, 121, 122.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.